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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1211

OWENSBORO-DAVIESS COUNTY HOSPITAL, a corporation;
CITY OF OWENSBORO, KENTUCKY and
DAVIESS COUNTY, KENTUCKY - - Petitioners

versus

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. ———

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CITY OF OWENSBORO, KENTUCKY and
DAVIESS COUNTY, KENTUCKY - - *Petitioners*

v.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor, - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Owensboro-Daviess County Hospital, City of Owensboro, Kentucky, and Daviess County, Kentucky, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 30, 1975.

I

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, not yet reported, appears as Appendix A hereto at pages 1a-34a. The Appendix to this Petition is hereinafter referred to as PA. The Findings of Fact, Conclusions of Law and Judgment of the District Court for the Western District of Kentucky appear at Appendix B hereto (PA 35a-41a).

II

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on September 30, 1975. A timely petition for rehearing in banc was denied on December 2, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. §1254 (1).

III

QUESTIONS PRESENTED FOR REVIEW

This is an action by the Secretary of Labor against two political subdivisions of Kentucky which operate a public hospital in Owensboro, Kentucky, claiming violation of an important federal statute, the Equal Pay Act of 1963, hereinafter sometimes referred to as the Act, by paying female nurses aides at an hourly rate less than male orderlies for what the Secretary

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claims is "equal work". There is a conflict among the Circuit Courts of Appeals of the United States in interpreting the meaning of the words "equal work" as used in the Act.

(1) Whether the term "equal work" means *equal work* or substantially identical work as the legislative history clearly sets forth and the Fifth Circuit has held, or does it mean *comparable work* or something less than equal work as the Fourth and Sixth Circuits have held?

(2) Whether the Secretary sustained his burden of proof in the Trial Court by showing that the aides at Owensboro-Daviess County Hospital performed "equal work" to the orderlies on jobs the performance of which required equal skill, effort and responsibility and which were performed under similar working conditions?

(3) Whether the Court of Appeals invaded the province of the Trial Court under Rule 52(a) F.R.C.P., 28 U.S.C.A., by making its own findings of fact on conflicting evidence?

(4) Whether a violation of the Act may be established by proof that an aide sometimes performed catheterizations and catheter irrigations on female patients which require greater skill and responsibility, but which conduct of the aide was in direct disobedience of the hospital employer's express directive prohibiting non-professional employees (aides) from performing those particular aspects of patient care on female patients?

IV

STATUTORY PROVISIONS INVOLVED

The Equal Pay Act of 1963 was enacted as an amendment to the Fair Labor Standards Act of 1938 adding the principle of equal pay for equal work regardless of sex. The part of the Act involved here is codified in 29 U.S.C.A. §206 (d) (1) and (d) (3) as follows:

> "(1). No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . ."
>
> * * * * * * *
>
> "(3). For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter."

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V

STATEMENT OF THE CASE

The Secretary of Labor brought this action under the Act in the United States District Court for the Western District of Kentucky to enjoin Owensboro-Daviess County Hospital, a non-profit corporation; City of Owensboro, Kentucky, and Daviess County, Kentucky, from allegedly violating the Act's equal pay provisions by paying male orderlies an average of twenty cents per hour more than female nurses aides for the performance of work at petitioners' hospital which the Secretary contended was "equal" within the meaning of 29 U.S.C.A. §206 (d). The Secretary also demanded damages in the amount of the wage differential due the aides from April 5, 1968, (Appendix before the Sixth Circuit hereinafter referred to as A at pages 6-9).

Trial before the Court without a jury began October 31, 1972 resulting in a decision for the hospital at the close of the Secretary's evidence on the ground that the Secretary failed to sustain his burden of proving "equal work"[1] (A. 302-303). Findings of Fact and Conclusions of Law were entered by the District Judge (P. A. 36a-41a). On the Secretary's appeal to the Sixth Circuit, the District Court was reversed and the case remanded (P A 1a-34a). The Court of Appeals found that most of the District Judge's Findings

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[1]The Secretary has the burden of proof of "equal work" and unequal pay before the burden shifts to the employer to show an exception under the Act, *Corning Glass Works* v. *Brennan*, 417 U. S. 188 (1974).

of Fact were "clearly erroneous" and not supported by the evidence.

The Secretary's discrimination charge as prosecuted was not limited to any department of the four-story, 462 bed general hospital. During the period in question at the trial, April 5, 1968, thru October 31, 1972, the hospital employed between 20 and 38 orderlies and between 163 and 190 aides, the ratio being approximately six to one (A 91).

The different classifications of aides and orderlies have existed for many years (A 28). Several different job descriptions for aides and orderlies were in effect at the hospital during the period in question, five of which were filed in evidence. They reflect differences in duties (A 72-94).

The January, 1972 revised job descriptions for aides and orderlies is a detailed description of the jobs of each. It contains a concise statement of many of the different duties actually performed by the orderlies which required greater skill, effort and responsibility and which were performed under different working conditions (A 80-90). These different jobs had been performed by orderlies for many years, and they included the following:

> ". . . they adjust the flow of the Cytol solution, change the bottle, check for bleeding of TUR patients. They give rectal suppositories. They give urethal suppositories. They retain, set up oxygen cylinders and tents when necessary. Traction is set up all over the hospital, not just orthopedics. The orderlies clean, change the anesthesial

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> supply, such as your oxygen, your gases, your filters; changing dressings on TUR's; planning, scheduling of the orderlies."
>
> * * * * * *
>
> ". . . They were doing these prior to 1972, but just were not listed in the job descriptions . . ." (A 26-28).

The differences in job performance is even more dramatic than is reflected by the job description (A 28, 68-69).

Aides spend substantially all of their time performing routine patient care, requiring nominal skill. When they report to work they are given a worksheet by their unit supervisors, and most of their time is consumed in performing the regular daily tasks listed on the worksheet (A 139-141). They bathe essentially all the patients, make the beds, serve the food trays three times a day, feed patients unable to feed themselves, remove all of the food trays three times a day, take temperature, pulse and respiration of patients as ordered by the physicians, record these matters on the patient's chart as necessary, and answer patient call lights for the numerous errands, requests and personal needs of the patient (A 118-125, 139-142, 150, 154-157, 218-219, 238-241, 249-250, 264-266, 283-285). The aide is assigned to a smaller area of the hospital and a fewer number of patients than the orderly (A 115-118), and the aides work under close and constant supervision of the Registered Nurse (RN) or Licensed Practical Nurse (LPN) in charge of their station (A 133, 262, 291-292).

The orderlies only spend a small portion of their time in routine patient care, such as that which consumes most of the aide's working time (A 116, 124-125). The orderlies are assigned to a much larger working area involving more than one station, an entire floor on some shifts, and occasionally on the 11:00 p.m. to 7:30 a.m. shift there will only be one orderly in the entire hospital (A 253, 275-276). They work at more than one station, and therefore, not under close supervision of any one supervisor (A 64-66, 290-292). They spend substantially all their time performing specific tasks which are assigned to them and which are not the primary responsibility of the aides (A 116, 124-126, 264-266).

The orderies perform many services upon all of the male patients in the hospital which would be embarrassing to the patient, his family, and the aides, if performed by a person of the opposite sex. This includes all care of the penis and scrotum and completing that portion of a bath when necessary (A 24-25, 72-76, 84-90).

The orderlies have always been trained in sterile techniques which require a high degree of skill and responsibility, such as catheterizations and catheter irrigations, and they perform all of these and other sterile techniques upon the male patients (A 42-43, 84-90). If there is any heavy work to be done in the hospital, either involving the lifting and ambulating or transporting patients or moving equipment, it is the orderlies' job to take care of the matter whenever the aides cannot physically handle it (A 72-76, 84-90, 115,

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120). They are responsible for controlling and restraining violent, alcoholic or overdosed patients, and they administer to criminal patients (A 62-63, 84-90, 129-130, 187, 196).

The orderlies are specially trained by physicians to set up and maintain the heavy traction equipment in the 37 bed orthopedic ward of the hospital and wherever else it is needed throughout the hospital (A 54-55, 59, 128, 233). They aid in applying and cut casts when ordered by a physician (A 84-90, 181, 227-228, 234-235).

An orderly must answer emergency calls (referred to as stat calls) throughout the hospital after making his own decision on priorities and to which emergency he will first respond (A 56-57, 130, 213-214, 257, 266-267). This additional responsibility of answering stat calls causes stress and strain, and is hard on an orderly's nerves (A 194).

All post-mortem care in the hospital is performed on females by the aides and on males by orderlies. Working with dead bodies is an unpleasant task, and a different working condition, and it must be performed several times more frequently by orderlies since there are fewer orderlies to handle such male patients as may die at the hospital (A 131-132).

Six orderlies are assigned regularly to X-ray, physical therapy and central supply, but the Secretary introduced no evidence as to what their duties were or that any aide performed duties which constituted "equal work" (A 60-61). Therefore, the Secretary's case seemed to be limited to "floor" orderlies.

The Secretary called certain orderlies as witnesses to ask what they did. Denford Morris testified that on a typical day he would perform from 5 to 7 catheter irrigations taking from 5 to 45 minutes each, and he catheterized male patients 5 or 6 times a day requiring 25 to 35 minutes each (A 172-174, 176-177). These are skilled sterile procedures which the orderlies perform regularly and frequently on all the male patients and which are performed by RN's and LPN's on women patients most of the time (A 152, 206, 242, 267-268, 280). Aides have not been taught catheterization or other sterile techniques since 1968 when several physicians insisted that catheterization of their female patients be performed only by skilled or professional persons, RN's or LPN's (A 34-35). At that time in 1968 the hospital administration ordered that aides would no longer perform catheterizations (A 37-39), but in spite of this, several aides testified that they had on occasion continued to perform a female catheterization (A 110). The order that no aide would perform catheterizations was restated and reconfirmed by the hospital administration in October, 1972 (A 112).

On the basis of the foregoing evidence the District Court dismissed the Secretary's complaint for failure to make out a case of "equal work".

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VI

REASONS FOR GRANTING THE WRIT

A

Introduction

Every health-care facility in the nation, which has not capitulated before the pressure of the Department of Labor, faces a dilemma over what to do about aides' and orderlies' compensation. As employees clamor for needed wage increases across the board, the Department of Labor insists that aides be paid the same rate as orderlies. The rising cost of medical care is a concern of all, and the Equal Pay Act has added to the problem. As a public, non-profit hospital, the petitioner could have given in to the pressure from the Secretary, increased the hourly rate of *all* aides as demanded and passed the increased cost to date of several hundred thousand dollars along to the consuming public, but this did not and does not appear to the hospital's Board of Managers to be in the best interests of the public which it serves.

The hospital was well aware of the historic distinction between aides and orderlies, a distinction in the form as well as substance of the work performed, a bona fide job classification. As the evidence reflected and the District Court found, this case did not involve "equal work", the performance of which required equal skill, effort and responsibility. The record is replete with evidence of dissimilarities in the jobs and greater requirements of effort, skill and responsibilities from

orderlies while aides consume most of their working time performing routine and repetitious tasks under direct orders and close supervision of the professional nursing staff, and the District Court so found. On appeal, the United States Court of Appeals for the Sixth Circuit held essentially all of the District Court's Findings of Fact to be clearly erroneous and reversed.

B

There is a Conflict Among the Circuits on the Interpretation of the Equal Pay Act.

Granting of certiorari is essential to the correct, orderly and fair administration of the Equal Pay Act in accordance with the intent of Congress. The provisions of the Act, which are at issue in this case, have never been construed by this Court, and there is a clear conflict between the Circuits in the meaning of the words "equal work" as used in the Act.

The Fifth Circuit case of *Hodgson* v. *Golden Isles Convalescent Homes, Inc.*, 468 F. 2d 1256 (5 Cir. 1972), is in direct conflict with the Sixth Circuit's holding in the instant case and the holding of the Fourth Circuit case of *Brennan* v. *Prince William Hospital Corporation*, 503 F. 2d 282 (4 Cir. 1974). The Sixth Circuit following the Fourth Circuit adopts the "substantial equality" interpretation of "equal work" and rejects the requirement of "substantial identity" which is demanded by the legislative history of the Act.

This record contains ample testimony of differences between the work of aides and orderlies, and it de-

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mands a conclusion that their work was not "equal" if the correct standard is applied.

The key to interpretation of the words "equal work" as used in the Act is found in the legislative history of the Act wherein the meaning of the words was fully discussed by the sponsors of the bill who repelled attempts to substitute "comparable work" for the more restrictive term "equal work". The Congress never intended to have the Courts make the substitution by misinterpreting the Act, at the suggestion and encouragement of the Secretary, and reach the harsh result arrived at by the Sixth Circuit in the instant case.

In *Golden Isles, supra,* at page 1258, the Fifth Circuit said:

> "The legislative history of the Equal Pay Act underscores the necessity of case-by-case analysis. By substituting the term 'equal work' for 'comparable work,' which was originally suggested, Congress manifested its intent to narrow the applicability of the Act. Cong. Rec. Vol. 19, Part 7 (88th Congress, 1st Sess.), at 8866, 8892, 8913-8917, 9192-9218, 9761-9762, 9854, and 9941. This legislative history is discussed extensively in Hodgson v. William and Mary Nursing Home, 65 L.C. ¶32,497 (M.D. Fla. 1971). It is not merely comparable skill and responsibility that Congress sought to address, but a substantial identity of job functions."

The holding of the Sixth Circuit to the contrary in the instant case is a repudiation of the legislative history.

Ironically, the *Golden Isles'* opinion was affirmed on October 31, 1972, the day trial started in the instant case. In *Golden Isles* the District Court had found that aides and orderlies did not perform "equal work" on the basis of the orderlies performing the following tasks which the aides did not perform:

1. Insertion of catheters on male patients
2. Irrigation
3. Total lifting
4. Setting up traction
5. Returning patients and driving patients
6. Primary setting up oxygen tanks requiring knowledge and skill

Additionally, the orderly is required to "float".

In the instant case the District Court made comparable findings of fact which were virtually identical to those found in *Golden Isles, supra,* that the orderlies performed the following tasks (among others) which the aides did not perform:

1. Catheterization of all male patients five or six times a day
2. Catheter irrigations five to seven times a day
3. Lifting heavy patients and performing work which requires more physical effort and strength than the work of aides
4. Setting up tractions involving extra skill and effort
5. Handling and controlling violent or alcoholic patients

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6. Setting up and putting oxygen in use and doing heavy lifting and transportation of oxygen tanks

Further, the orderly does not work under close supervision and must "float" or move between stations or floors to perform his specialized tasks or to answer stat calls as they arise. Additional differences found by the District Court to exist included:

1. Performance of other sterile procedures on male patients, requiring skill
2. Cutting of casts requiring skill
3. Performance of more post-mortems by orderlies, an unpleasant task
4. Orderlies had less free time
5. The responsibility of orderlies' work caused them more tension and strain

There was testimony to support all the findings of fact of the District Court but the Court of Appeals after *weighing* the evidence in the record found that "critical" findings of fact were clearly erroneous. The Court below said:

> ". . . Moreover, the record shows, contrary to the findings made by the district court, that some aides, as well as orderlies, were trained to do sterile procedures and did them on a regular basis; that aides as well as orderlies lifted heavy patients, restrained unruly ones, and responded to emergency calls; and that aides had less free time than orderlies did. In addition, although the record discloses that as a general rule orderlies and not aides set

up traction and assisted in removing casts, these duties were performed so infrequently that they did not render the jobs of aides and orderlies substantially different. Finally, although orderlies may have, on the average, done more post-mortem work than aides did, this modest difference does not justify the higher wages paid to orderlies" (PA 4a-5a).

After making its own factual findings, the Sixth Circuit then repudiated the legislative history of the Act and the holding of *Golden Isles, supra.* Instead of "substantial identity of job functions" a lesser standard was applied following *Prince William, supra,* thereby essentially establishing for health-care facilities across the country the per se rule of "equal work" for aides and orderlies which has been sought by the Department of Labor and was rejected in *Golden Isles.*

The Sixth Circuit, in the instant case, recognized that the proof included evidence of additional tasks performed by orderlies which were not performed by aides such as cutting casts, care of unruly patients, and greater frequency of performing post-mortem procedures. Even though these constituted differences in the work performed by aides and orderlies the Court held the work was still "equal" by looking at one item and distinction at a time and discounting its importance while refusing to acknowledge that when the whole spectrum of work performed is considered the lack of equality or "substantial identity of job function" is apparent.

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The legislative history of the Equal Pay Act cries out for a reversal of the decision below and a declaration by this Court of the correct interpretation of the Act.[2] It indicates:

(1) The Secretary was specifically precluded from issuing interpretive regulations. The precise language of the Act was to speak for itself.

(2) The House of Representatives rejected a Senate-passed version (H.R. 6060) and specifically rejected the Senate interpretation of the language used and the Senate Report.

(3) House sponsors of Equal Pay bills recognized that the House-passed bill which became law was conservative and limited but voted for it expressing hope that the Senate would make it more liberal. Instead the Senate adopted the House-passed version.

(4) The House adopted an unusually strict measure of proof for the Secretary in the Act and rejected the Senate interpretation in so many words and illustrations.

(5) The Senate accepted completely the House-passed version with only cursory comments and without debate on the differences from the earlier passed Senate bill which was tabled.

On May 17, 1963 the Senate passed S. 1409, its version of the Equal Pay law. On May 23, 1963 the House debated the Senate bill and its own version,

[2]PA 42a-51a, Appendix C, hereto contains pertinent parts of the Congressional Debate on the Equal Pay Act.

H.R. 6060, which was quite different, and rewrote an entirely different bill.

On May 23, 1963 on the advice of its Majority and Minority leadership that there would be no Equal Pay Act in 1963 unless it did, the Senate scrapped the bill which it had passed (S. 1409) and adopted the House-passed bill (H.R. 6060 as amended) without any oral debate and with little comment except that the Senate was capitulating to the House.

This series of events makes the Senate debate significant, not in interpreting H.R. 6060 which it does not do, but in showing complete capitulation, which it does.

The lengthy House debate on the meaning of the Bill by its managers is of the utmost and prime consideration. As Appendix C (PA 42a-51a) we quote from Congressman Goodell (R-N.Y.), Griffin (R-Mich.), Freylinghuysen (R-N.J.), and Thompson (D-N.J.), the managers of the bill on the floor of the House.

In *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951), this Court held in construing the legislative history of the Miller-Tydings Act that the remarks by the managers or sponsors of a bill in the floor debate should be given great weight in the interpretation of the statute.

Hodgson v. *William and Mary Nursing Hotel,* 65 L.C. par. 32,497, 20 W.H. Cases 10 (MD Fla. 1971), is the only case in which the legislative history of the Equal Pay Act has been considered in detail and is the decision on which *Hodgson* v. *Golden Isles, supra,* relied. The principles enunciated in *Schwegmann Bros, supra,* were followed in *William and Mary, supra.*

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See also *United States* v. *United Mine Workers,* 330 U. S. 258, 279-280 (1947), where the Court deferred to the floor managers' comments for construction of the bill.

When the legislative history of the Act is given the consideration that it is due, it becomes clear that the Fifth Circuit was correct in holding in *Golden Isles, supra,* that the Act requires the Secretary to prove a "substantial identity of job functions" to sustain his burden, and it was not done in this case.

C

The Court Below Has Decided an Important Question of Federal Law Which Has Not Been, But Should be Settled by This Court.

Except for the Court's decision in *Corning Glass Works* v. *Brennan,* 417 U. S. 188 (1974), which construed a limited question of "working conditions", the Supreme Court has not construed or interpreted the provisions of the Equal Pay Act. The Department of Labor has been successful in having a misinterpretation of the legislative history of the Act adopted by several Courts of Appeal resulting in incorrect interpretation of the Act. In addition to the case at bar, they include *Shultz* v. *Wheaton Glass Co.,* 421 F. 2d 259 (3 Cir. 1970), cert. den. 398 U. S. 905 (1970); *Hodgson* v. *Square D Co.,* 459 F. 2d 805 (6 Cir. 1972), cert. den. 409 U. S. 967 (1973); *Shultz* v. *American Can Co.,* 424 F. 2d 356 (8 Cir. 1970); *Shultz* v. *First Victoria National Bank,* 420 F. 2d 648 (5 Cir. 1969), and *Brennan* v.

Prince William Hospital Corp., 503 F. 2d 282 (4 Cir. 1974), cert. den. 420 U. S. 972 (1975).

The Fifth Circuit later repudiated its holding in *First Victoria National Bank, supra, sub silento* by its decision in *Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719 (5 Cir. 1970), and *Golden Isles, supra.* In *First Victoria National Bank, supra,* the Department of Labor persuaded the Court to adopt an erroneous and false legislative history.

However, the damage was done and the Court of Appeals for the Third Circuit cited and followed *First Victoria National Bank, supra,* adopting its so-called legislative history in *Shultz* v. *Wheaton Glass Co., supra,* and the Eighth Circuit adopted it in *Shultz* v. *American Can, supra. Prince William, supra,* then followed the error.

When *Golden Isles, supra,* was decided in 1972 the conflict in the Circuits became apparent, and even though the Department of Labor had lost the case, it did not seek certiorari. We submit this was not done because it would have resulted in the Supreme Court adopting the proper legislative history and declaring the interpretation of the Equal Pay Act in accordance with *Golden Isles,* the first case in which a Court of Appeals had found the true legislative history.

Instead of seeking clarification from the Supreme Court, the Department of Labor has instead forced countless settlements in cases brought against health-care facilities across the country under the authority of the cases decided because of the adoption of an incorrect, improper and inapplicable legislative history

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of the Act,[3] although in the health-care field it has lost several cases tried in the District Courts.[4]

Unless the meaning of the Equal Pay Act is settled by this Court, confusion will continue to run rampant in the Courts of Appeal as well as the District Courts, and such cost as is incurred by the confusion will be borne by the consuming public.

D

The Decision Below Should be Reviewed Because it Violated Rule 52 (a), F.R.C.P.[5]

There was evidence in the record supporting the decision of the District Court, and the Court of Appeals misconceived its role in retrying the facts of the case, weighing the evidence and concluding in virtually every material instance that the District Court's Findings of Fact were "clearly erroneous". As the Court said in *Golden Isles, supra,* at page 1257:

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[3]Numerous settlements in uncontested cases are reported in the labor law services. Examples of settled cases are *Hodgson* v. *St. Elizabeth Hospital,* 70 LC 32,863, 20 WH 1242 (ED Ky. 1973); *Hodgson* v. *Skyvue Terrace, Inc.,* 68 LC 32,699, 20 WH 754 (WD Pa. 1972); and *Brennan* v. *St. Luke Hospital,* 72 LC 32,969, 21 WH 392 (ED Ky. 1973).

[4]*Brennan* v. *Cenco Hospital & Convalescent Homes Corp.,* 71 LC 32,908, 21 WH 29 (SD Tex. 1973); *Hodgson* v. *Good Shepherd Hospital,* 327 F. Supp. 143 (ED Tex. 1971); *Shultz* v. *Royal Glades, Inc.,* 66 LC 32,548, 67 LC 32,633 (SD Fla. 1971); *Hodgson* v. *William & Mary Nursing Hotel,* 65 LC 32,497, 20 WH 10 (MD Fla. 1971); *Shultz* v. *Kentucky Baptist Hospital,* 62 LC 32,296, 19 WH 403 (WD Ky. 1969); and *Hodgson* v. *Kuakine Hospital,* 73 LC 32,014 (D. Haw. 1974).

[5]F.R.C.P. 52 (a) provides: ". . . Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. . . ."

> ". . . The Secretary would have us ascribe our own weight to the factual differences that appear in the evidence, but weighing and evaluating the facts is properly the task of the trial court . . ."

In the decision below the Court accepted the suggestion of the Secretary and retried the case ascribing weight and credibility to the evidence in a totally different way from the District Court.

We submit that the important distinction which the decision below tends to lose cite of is that the Secretary failed in the District Court to meet the burden of establishing by substantial evidence that *any* aide and orderly performed "equal work" on jobs which required equal skill, effort and responsibility and which were performed under similar working conditions. Therefore, the burden imposed on the Secretary by the Act to prove equal work[6] was never met, and the burden never passed to the hospital to prove that an exception applied.

If the Secretary had met his burden, then the hospital would have been required to proceed with its proof and establish that the difference in pay was not based upon sex discrimination but was based upon some other valid exception, such as greater skill, effort or responsibility. Such proof by the hospital would need to be brought forth for every instance where the Secretary had made a prima facie case that *an aide* and *an orderly* performed "equal work".

Specific Findings of Fact held "clearly erroneous" will be discussed.

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[6]*Corning Glass Works* v. *Brennan, supra.*

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JOB DESCRIPTIONS

The Court below held that the District Court's Finding of Fact (9) that the job descriptions for aides and orderlies reflected substantial differences in duties was *clearly erroneous.*

Exhibit 6 to the deposition of Mr. Collins, the Hospital administrator, is a job description for aides prior to 1969 (A 31, 92-94). It shows the routineness and simplicity of the tasks assigned to aides which necessarily filled their work day with jobs requiring a minimal level of skill and responsibility. Furthermore, the job description is substantially different from the earliest orderlies' job description in the record which was in effect as revised in June, 1969 (A 24, 72-76).

The job descriptions of aides and orderlies as revised in 1969 (A 24, 72-79) are substantially different when you consider that the aides' job description *excluded* all sterile procedures associated with catheterization, anchoring foley catheter, bladder irrigations, bladder instillations and catheter irrigations (A 79). Whereas, performance of these sterile procedures on males is included in the orderlies' duties (A 74). Additionally, the orderlies' job description includes several tasks requiring greater effort, skill, or responsibility, such as setting up oxygen equipment, setting up cots, heavy lifting, setting up traction and answering stat calls.

Finally, we come to the 1972 revised job description (A 25-26, 80-90) which contained additional differences.

According to the administrator these different duties had been performed by orderlies for years, as many as 20 years, but simply never had been written up and added to the formal job description (A 27).

The District Court's Finding of Fact was not *clearly erroneous* as the Court below held.

STERILE PROCEDURES

The Court below determined that the District Court's Finding of Fact (13) was clearly erroneous stating that until October 5, 1972, aides performed virtually all catheter irrigation and catheterization of females. The District Court found that almost all catheter irrigations and catheterizations upon male patients were performed by orderlies, but upon female patients these procedures were performed by RN's and LPN's and very rarely, if ever, by aides.

The Court's finding about orderlies performing catheterization and catheter irrigation was based on the direct testimony of orderly, Denford Morris (A 172-177). Further, the Finding of Fact is supported by the testimony of the administrator who stated that all orderlies are trained to perform these sterile procedures and that all the floor orderlies perform them on a regular basis (A 43-44) consuming a considerable amount of their time at work.

As to the aides, they had not been trained in performing sterile procedures since 1968, and they were specifically instructed by the hospital administration in 1968 to stop performing these sterile procedures on female patients because a number of doctors wanted

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sterile procedures performed only by professional personnel. If some of the older aides were performing catheterizations on female patients on an irregular and infrequent basis as the evidence indicated, it was directly contrary to specific orders of the hospital administration, and we submit the infrequent performance of a job requiring extra skill should not create "equal work" especially when performed in defiance of the employer's express directives. The Trial Court's Findings of Fact about the performance of sterile procedures requiring extra skill were not *clearly erroneous.* On the contrary, what is clearly erroneous is the Court of Appeal's determination that aides previously trained to do sterile procedures performed this skilled work on a regular basis until a few weeks before the trial.

STAT CALLS

The Court below held that the District Court's finding (15) that the orderly was required to answer stat or emergency calls upon which not infrequently life itself depended was clearly erroneous.

Mr. Collins testified that an orderly gets stat calls consistently to go from one nursing station to another to get a patient up, to do a bladder irrigation, to give an enema, or to perform some other task (A 56-57). Denford Morris testified that stat calls are where you drop everything else and go and may involve taking a patient to coronary care (A 182-183). There is evidence to support this Finding of Fact of the District Court also, and it was not *clearly erroneous.*

CUTTING OF CASTS

The Court below held that the District Court finding (14) that a typical orderly exercises the skill of cutting casts was clearly erroneous.

Aides do not cut casts (A 80-84, 186, and 234-235). Cutting casts pursuant to the direction of the physician is a job that has been taught to and performed by orderlies for years and not by aides (A 25-26, 86, 181 and 235). The District Court's finding was not *clearly erroneous,* and the cutting of casts is definitely a task requiring the exercise of greater skill.

UNRULY PATIENTS

The Court below held that the District Court's Finding of Fact (18) that the orderly has primary responsibility for the care of unruly patients was clearly erroneous.

The job description of the orderly consisting of duties that the orderlies have been performing for years provides that the orderly has the duty to:

> "16. Assist in restraining patients who are Alcoholics, have delerium tremens, or patients who are in danger of harming themselves or others. Escorts unruly patients from emergency room to their assigned room" (A 85).

The hospital administrator testified that the orderly restrains alcoholics, people on drugs or violent people, that it is the orderlies' responsibility, and that the aides call on the orderlies to do this job (A 62-63).

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The testimony of orderlies, Kenneth Thomasson and Denford Morris, confirmed Mr. Collins' testimony (A 196, 183, 187). Also, Mrs. Bryant, an aide, testified that if an unruly patient on the surgical floor became bad enough, they would call an orderly to restrain him (A 130).

We submit there was evidence again to support the District Court's finding, and it was not *clearly erroneous.*

GENERAL FINDINGS OF TYPICAL ORDERLY'S WORK

The Court below found clearly erroneous the District Court's Finding of Fact (11):

> "The typical orderly . . . spends substantially all of his working time in performing Sterile Techniques, including catheterizations, lifting heavy patients, changing TUR dressing, setting up Tractions, handling or controlling violent or alcoholic patients, answering emergency calls (referred to as Stat calls), and doing heavy lifting of oxygen tanks, orthopedic and bedfast patients, and other objects."

There is direct evidence in the record supporting this finding even to the extent of specifying the amount of time spent in some of the tasks such as catheterizations and catheter irrigation which is a duty exclusively performed by the orderlies on male patients and which requires a considerable amount of the time in their every day routine. The validity of this finding of fact can only be clearly appreciated when it is placed along side

the preceding finding (10) made by the District Court referrable to what the aides must do with their time to accomplish the jobs assigned to them. The District Court found:

> "(10) The typical aide spends substantially all of her time at the hospital in routine patient care, requiring nominal skills, such as giving baths to patients, making beds, serving and picking up food trays, feeding patients, making errands to perform small services and answer requests for small personal needs."

This is the key to the difference in the jobs of aides and orderlies in the instant case. The aide has a well laid out worksheet of regular and routine, time-consuming duties which must be performed on every shift (A 139-140) and which require only nominal skill.[7] She is directly subject to the unit RN and LPN team leader in her every move (A 56-57) and works under very close supervision (A 133). Therefore, by comparison only minimal responsibility rests on the aides' shoulders (A 291-292). The ratio of aides to orderlies over the period in question is approximately 6 to 1 (A 29, 91). Necessarily, there are fewer orderlies available to do the specialized tasks assigned to them in the 462 bed hospital. They do not have time to perform the

[7]Petitioner does not mean to imply that the aides' work is any less important to the operation of the hospital than the orderlies' work. Petitioner only implies that it is different just like the job of the ward clerk, cook, watchman, or custodian, though essential, is different and therefore not "equal work", and the Secretary cannot sustain the burden that the Act imposes on him.

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routine, unskilled duties which the aides are hired to perform.

The orderlies do not pass out or pick up food trays, feed patients, bathe patients or make beds on a regular basis. This is done by the aides routinely, and it consumes a major part of their time. Various witnesses testified to the time required to pass out the trays, feed a patient, make a bed, and do other routine tasks performed by aides (A 118-120, 140-142, 150, 154-157, 218-219, 238-240, 249-250, 264-265, and 283-286).

Norma Ward, an RN and a Medical Unit Supervisor at the hospital, summarized this distinction between aides and orderlies:

> "Q. I asked her if she could think of any other differences other than what she's stated.
>
> "A. . . . they have just a really regular routine. The Assistant's work is sort of planned for them by us. They have a daily written assignment and orderlies don't have this and it's frustrating to not have a, you know, a definite, set pattern every day; you can't be just real routine; this causes them frustration and us, too" (App. 265-266).

When you add up the time required for the aides' duties mentioned, the answering of call lights for various personal needs of patients, and taking of temperatures, pulse and respiration, you have about consumed all the working time of the aide (A 123-124).

The general distinction in the work of aides and orderlies at Owensboro-Daviess County Hospital as pointed out in the District Court's finding of fact (10)

and (11) shows that their work does not legally constitute "equal work". The District Court's findings are supported by evidence and should not have been found *clearly erroneous* by the Court below.

In *Local Union 984, Int. Bro. of Teamsters, etc.* v. *Humko,* 287 F. 2d 231 (6 Cir. 1961) the applicable rule is stated:

> "Under the provisions of Rule 52 (a), F.R.Civ.P., 28 U.S.C.A., this Court is bound by the findings of fact of the Trial Court unless they are clearly erroneous. In applying this rule in McAllister v. United States, 1954, 348 U. S. 19, 20, . . . the Supreme Court enunciated the following test:
>
> " 'A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," United States v. Oregon State Medical Soc., 343 U. S. 326, 339 . . . United States v. United States Gypsum Co., 333 U. S. 364, 395 . . .' " *Id.* at 237.

We submit that a review of the entire evidence contained in the record in the instant case will leave the Court concluding that no mistake was committed by the District Court in its factual findings or its conclusion that the aides and orderlies at Owensboro-Daviess County Hospital did not perform "equal work".

If the Court below had not repudiated the findings of fact of the District Court by picking and choosing among the available evidence (which included evidence supporting the District Court's findings of fact), the

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Court of Appeals below would have been compelled to affirm the District Court's Judgment that aides and orderlies at Owensboro-Daviess County Hospital do not perform equal work requiring equal skill, effort and responsibility and under similar working conditions.

E

"Equal Work" Cannot be Created by Female Employees Performing Work That They Have Been Specifically Directed Not to Perform by Their Employer.

The Court below, in accord with decisions of other courts, concedes that the performance of such sterile procedures as catheterizations and catheter irrigations requires the exercise of greater skill and responsibility[8] than the other tasks performed by the aides and orderlies and would support a different wage rate if regularly performed by orderlies and if not performed by aides. The District Court's Finding of Fact (13) states:

> "At all times, orderlies have been trained in Sterile Techniques, which requires substantial skill, and includes catheterization, catheter irrigation, rectal suppositories, TUR dressing change, and bladder

[8]In *Hodgson* v. *William and Mary Nursing Hotel* (M.D. Fla. 1971), 65 L.C. par. 32,497, 20 W.H. Cases 10 the delicacy of the procedure of catheterizing a male patient, the skill required, and the responsibility associated with the job is recognized and discussed, and in *Brennan* v. *Prince William Hospital Corporation*, 503 F. 2d 282 (4 Cir. 1974), the Court, noting that the orderlies performed these procedures on male patients but aides did not perform them on female patients, stated that: "The orderly's job therefore does call for the exercise of skill and responsibility which is not required of the aides."

irrigation. Since October of 1968, aides have received no training in Sterile Techniques. A typical orderly in a typical day, would perform from five to seven catheter irrigations varying from five minutes to 45 minutes each, and would perform a catheterization upon a male patient five or six times in a day, requiring twenty-five to thirty-five minutes each. These are skilled procedures. Almost all catheter irrigations and catheterizations upon the patients are performed by orderlies. Upon female patients almost all of these procedures are performed by Registered Nurses or Licensed Practical Nurses, and very rarely, if ever, by aides."

This finding should have been determinative of the appeal and should have resulted in the affirmance of the District Court's Judgment. It was supported by the hospital administrator's testimony (A 43-46), which the District Court as the trier of fact was entitled to believe, and by the testimony of a Registered Nurse and Medical Unit Supervisor, Norma Ward, who stated:

"Q. What are some of the things that you would need an orderly for that you would need him right now?

"A. Well, if a patient was in distress I can think of a reason that I would need him; if he had a full bladder and he needed to be catheterized, I'd need an orderly to do that.

"Q. If it were a female patient who would do it in that situation?

"A. The nurses would.

"Q. And if it's a male patient who does it?

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"A. Why, the orderly does.

"Q. Has that been true for how long?

"A. The orderlies have always done catheterizations.

"Q. Okay; and do the RN's always do it in that situation you've described, always.

"A. Well, we do—now they do, the RN's or the LPN's.

"Q. All right; and before October 1st in that situation where it needed to be done right now, did the RN's or the LPN do it?

"A. Most of the time, but then there have been times when trained nurse assistants that could do it on an infrequent or irregular basis."[9] (A. 267-268)

The hospital stopped teaching aides to perform catheterizations or other sterile techniques in 1968 when several physicians insisted that catheterization of the female patients be performed only by skilled persons, RN's or LPN's (A 34-35). At that time, the hospital administration ordered that aides would no longer perform catheterization (A 37-39), but in spite of this, several aides testified that they had on occasion performed a female catheterization (A 110). The order that no aides would perform catheterizations was restated by the hospital administration in October, 1972 (A 112).

It is recognized by the Circuit Court below that the performance of catheterization on male patients consti-

[9]In the decision of the Sixth Circuit Norma Ward's testimony is erroneously cited for the proposition that aides perform such sterile procedures on a regular basis. Her testimony is to the contrary.

tutes work that requires skill and is a task the performance of which would make the job of orderlies require greater skill than the job of aides. If the catheterization procedure was performed consistently on a regular basis by the orderlies there would not be "equal work" under the Act.

To overcome this apparent distinction in job performance, the Secretary introduced evidence that would warrant a factual conclusion that some aides perform catheterizations on female patients on an infrequent and irregular basis, but this was in direct disobedience of the hospital administration's orders in the matter issued in 1968.

We submit that a Court should not find "equal work" to exist on the basis of an employee performing a job which she has been specifically directed not to perform by her employer. If this were not the law, it would seem that the employee would be allowed to make a case for "equal work" by her own disobedience of her employer's direct orders and usurpation of the work of a fellow employee. This leads to an unfair and unwarranted result as was reached in the Court below, and it should not be condoned by this Court.

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VII

CONCLUSION

This case involves a serious question of the interpretation of a Federal Statute, the Equal Pay Act of 1963. There is a conflict among the circuits in the definition of the principle words of the Act—"equal work". Some of the circuits are following a rule that interprets the Act's language in a manner which conflicts with and effectively repudiates the legislative intent of Congress in enacting the Act. The Supreme Court should grant certiorari, clarify the conflict of the circuits, and declare the meaning of this important federal law.

After granting certiorari the Court should reverse the decision and judgment of the United States Court of Appeals for the Sixth Circuit and enter judgment affirming the United States District Court for the Western District of Kentucky which found on an analysis of the facts of this case that the aides and orderlies at Owensboro-Daviess County Hospital did not perform "equal work".

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition were mailed by First Class Mail, postage prepaid, to Hon. Donald S. Shire, Deputy Associate Solicitor, U. S. Department of Labor, Room 4141 Main Labor, 14th and Constitution Avenue, N.W., Washington, D.C. 20210, attorney for the Respondent, and to Solicitor General, Department of Justice, Washington, D.C. 20530; this —— day of February, 1976.

Ronald M. Sullivan

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